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Federal Mandatory Minimum Sentencing Statutes: An Abbreviated Overview

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Summary

Federal mandatory minimum sentencing statutes limit the discretion of a sentencing court to impose a sentence that does not include a term of imprisonment or the death penalty. They have a long history and come in several varieties: the not-less-than, the flat sentence, and piggyback versions. Federal courts may refrain from imposing an otherwise required statutory mandatory minimum sentence when requested by the prosecution on the basis of substantial assistance toward the prosecution of others. First-time, low-level, non-violent offenders may be able to avoid the mandatory minimums under the Controlled Substances Acts, if they are completely forthcoming.

The most common imposed federal mandatory minimum sentences arise under the Controlled Substance and Controlled Substance Import and Export Acts, the provisions punishing the presence of a firearm in connection with a crime of violence or drug trafficking offense, the Armed Career Criminal Act, various sex crimes including child pornography, and aggravated identity theft.

Critics argue that mandatory minimums undermine the rationale and operation of the federal sentencing guidelines which are designed to eliminate unwarranted sentencing disparity. Counter arguments suggest that the guidelines themselves operate to undermine individual sentencing discretion and that the ills attributed to other mandatory minimums are more appropriately assigned to prosecutorial discretion or other sources.

State and federal mandatory minimums have come under constitutional attack on several grounds over the years, and have generally survived. The Eighth Amendment's cruel and unusual punishments clause does bar mandatory capital punishment, and apparently bans any term of imprisonment that is grossly disproportionate to the seriousness of the crime for which it is imposed. The Supreme Court, however, has declined to overturn sentences imposed under the California three strikes law and challenged as cruel and unusual. Double jeopardy, ex post facto, due process, separation of powers, and equal protection challenges have been generally unavailing.

The United States Sentencing Commission's *Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011) recommends consideration of amendments to several of the statutes under which federal mandatory minimum sentences are most often imposed.

This is an abbreviated version of CRS Report RL32040, *Federal Mandatory Minimum Sentencing Statutes*, stripped of its citations, footnotes, and appendixes.

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Introduction

Federal mandatory minimum sentencing statutes (mandatory minimums) demand that execution or incarceration follow criminal conviction. Among other things, they cover drug dealing, murdering federal officials, and using a gun to commit a federal crime. They have been a feature of federal sentencing since the dawn of the republic. They circumscribe judicial sentencing discretion, although they impose few limitations upon prosecutorial discretion, or upon the President's power to pardon. They have been criticized as unthinkingly harsh and incompatible with a rational sentencing guideline system; yet they have also been embraced as hallmarks of truth in sentencing and a certain means of incapacitating the criminally dangerous. This is a brief overview of federal statutes in the area and a discussion of some of the constitutional challenges they have faced.

Mandatory minimums come in many stripes, including some whose status might be disputed. The most widely recognized are those that demand that offenders be sentenced to imprisonment for "not less than" a designated term of imprisonment. Some are triggered by the nature of the offense, others by the criminal record of the offender. A few members of this "not less than" category are less "mandatory" than others, because Congress has provided a partial escape hatch or safety valve. For example, several of the drug-related mandatory minimums are subject to a "safety valve" for small time, first time, non-violent offenders that may render their minimum penalties less than mandatory, or at least less severe. Still others can be avoided at the behest of prosecution for a defendant's substantial assistance against his cohorts. Some of the other "not-less-than" mandatory minimums purport to permit the court to sentence an offender to a fine rather than to a mandatory term of imprisonment.

A second generally recognized category of mandatory minimums consists of the flat or single sentence statutes, the vast majority of which call for life imprisonment. Closely related are the capital punishment statutes that require imposition of either the death penalty or imprisonment for life, or death or imprisonment either for life or for some term of years. The "piggyback" statutes make up a third class. The piggyback statutes are not themselves mandatory minimums but sentence offenders by reference to underlying statutes including those that impose mandatory minimums.

Substantial Assistance: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code," 18 U.S.C. 3553(e).

As a general rule, a defendant is entitled to a sentence below an otherwise applicable statutory minimum under the provisions of Section 3553(e) only if the government agrees. The courts have acknowledged that due process or equal protection or other constitutional guarantees may provide a narrow exception. "Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion." A defendant is entitled to relief if the Government's refusal constitutes a breach of its plea agreement. A defendant is also "entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end." Some courts have suggested that a defendant is entitled to relief if the prosecution refuses to move under circumstances that "shock the conscience of the court," or that demonstrate bad faith, or for reasons unrelated to substantial assistance.

A majority of the judges who answered the Sentencing Commission's survey agreed that relief under Section 3553(e) should be available even in the absence of motion from the prosecutor.

The substantial assistance exception makes possible convictions that might otherwise be unattainable. Yet, it may also lead to "inverted sentencing," that is, a situation in which "the more serious the defendant's crimes, the lower the sentence – because the greater his wrongs, the more information and assistance he had to offer to a prosecutor"; while in contrast the exception is of no avail to the peripheral offender who can provide no substantial assistance. Perhaps for this reason, most of the judges who responded to the Sentencing Commission survey agreed that a sentencing court should not be limited to assistance-related factors and should be allowed use of the generally permissible sentencing factors when calculating a sentence under Section 3553(e).

Sentencing Commission Report: Early in its history, the Sentencing Commission gave Congress a report to Congress on the challenges it believed mandatory minimum sentencing statutes presented. The Sentencing Commission's second mandatory minimum report contains extensive statistical analysis, makes recommendations, and summarizes views of those who favor mandatory minimums and those who oppose them. Proponents contend that mandatory minimum sentences: (1) promote sentencing uniformity and prevent sentencing disparity; (2) afford greater public protection through certain punishment, deterrence and incapacitation; (3) inflict just desserts; (4) induce plea bargains and offender cooperation and thus contribute to law enforcement efficiency; and (5) assist state and local law enforcement efforts.

Opponents, on the other hand, contend that mandatory minimum sentences: (1) contribute to both excessive uniformity and unwarranted disparity; (2) result in disproportionate and excessively severe sentences; (3) fail to account for individualized circumstances; (4) transfer sentencing discretion from judges to prosecutors; (5) constitute neither a deterrent nor an effective law enforcement tool; (6) interfere with state law enforcement efforts; and (7) adversely impact various demographic groups.

It omits at least one argument for mandatory minimums. During the Commission's first decade and a half, the Commission created its own system of mandatory minimum penalties. The Guidelines denied judges sentencing discretion. Imprisonment was mandatory by operation of the Guidelines in the vast majority of cases. True, it occurred by operation of the exercise of a delegation of Congress's legislative authority rather than by direct exercise. Yet the result was the same, a mandatory minimum term of imprisonment. The Guideline system was more nuanced, but that is a difference of degree not of kind.

Constitutional Boundaries

Defendants sentenced to mandatory minimum terms of imprisonment have challenged them on a number of constitutional grounds beginning with Congress's legislative authority and ranging from cruel and unusual punishment through ex post facto and double jeopardy to equal protection and due process. Each constitutional provision defines outer boundaries that a mandatory minimum must be crafted to honor; none confine legislative prerogatives in any substantial way.

The federal government is a creature of the Constitution. It enjoys only such powers as can be traced to the Constitution. All other powers are reserved to the states or to the people. Among the powers which the Constitution bestows upon Congress are the powers to define and punish felonies committed upon the high seas, to exercise exclusive legislative authority over certain federal territories and facilities, to make rules governing the Armed Forces, to regulate interstate and foreign commerce, and to enact legislation necessary and proper for the execution of those and other constitutionally granted powers. It also grants Congress authority to enact legislation

"necessary and proper" to the execution of those powers which it vests in Congress or in any officer or department of the federal government.

Many of the federal laws with mandatory minimum sentencing requirements were enacted pursuant to Congress's legislative authority over crimes occurring on the high seas or within federal enclaves, or to its power to regulate commerce. When a statute falls for want of legislative authority, the penalties it would impose fall with it. This has yet to occur in the area of mandatory minimum sentences.

The Commerce Clause vests Congress with authority to regulate three broad categories of interstate commerce. In the words of *United States v. Lopez*, "[f]irst, Congress may regulate the use of the channels of interstate commerce.... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." A few years later, the Court reiterated "that Congress may [not] regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." Yet, purely intrastate activities may have a sufficient impact on interstate commerce to bring them within the reach of Congress's Commerce Clause power. So it is in the case of the Controlled Substances Act where several mandatory minimums are found.

The Court in *Comstock* provided a hint of the scope of Necessary and Proper Clause. The statute there authorized the Attorney General to continue to hold a federal inmate, pending a civil commitment determination, after his scheduled date of release. The Court analyzed the breadth of the power without any explicit reference to any other constitutional power, deciding that "[T]he statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the imprisonment of others."

The Constitution grants the President authority to negotiate treaties and the Senate the authority to approve them in the exercise of its advice and consent prerogatives. Almost a century ago, the Court observed that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, §8, as a necessary and proper means to execute the powers of the Government." The Controlled Substances Act, the home of several mandatory minimums, might be considered implementation of various treaties of the United States relating to controlled substances.

Congress enjoys legislative authority over felonies on the high seas, over matters occurring within the territorial jurisdiction of the United States, and incident to the maritime jurisdiction of the federal courts. It has exercised the authority frequently to enact criminal laws applicable within the territorial and special maritime jurisdiction of the United States. Some of these provisions include mandatory minimums.

Mandatory minimums implicate considerations under the Eighth Amendment's cruel and unusual punishments clause. The clause bars mandatory capital punishment statutes. Although the case law is somewhat uncertain, it seems to condemn punishment that is "grossly disproportionate" to the misconduct for which it is imposed. Only in extremely rare circumstances, however, is a sentence of imprisonment likely to be thought so severe as to be disproportionate to the gravity of the offense. The clause does bar imposition of a mandatory life term of imprisonment upon a juvenile.

"Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the *maximum*

penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," *Apprendi v. New Jersey.* Initially unwilling to extend *Apprendi* to mandatory minimums in *Harris*, the Court did so in *Alleyne v. United States*. Neither the Sixth Amendment, *Apprendi*, nor *Alleyne* limits Congress's authority to establish mandatory minimum sentences, nor limits the authority of the courts to impose them. They simply dictate the procedural safeguards that must accompany the exercise of that authority.

While "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another," the Supreme Court has observed that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." Thus, the lower federal courts have regularly upheld mandatory minimum statutes when challenged on separation of powers grounds, and the Supreme Court has denied any separation of powers infirmity in the federal sentencing guideline system which at the time might have been thought to produce its own form of mandatory minimums.

Drug Crimes

Federal law regulates the cultivation, manufacture, distribution, export, import, and possession of certain plants, drugs, and chemicals, which it designates as controlled substances and classifies according to medicinal value and potential for abuse under the Controlled Substances Act and the Controlled Substances Import and Export Act. The acts contain a number of mandatory minimum penalty provisions. Most involve possession with the intent to distribute (traffic) substantial amounts of eight controlled substances which are considered highly susceptible to abuse. The mandatory minimums are structured so that more severe sentences attend cases involving very substantial quantities, death or serious bodily injury, or repeat offenders. The penalties of the underlying offense apply to anyone who attempts or conspires to commit any controlled substance offense that carries a mandatory minimum. The eight trigger substances are heroin, powder cocaine, cocaine base (crack), PCP, LSD, propanamide, methamphetamine, and marijuana. Each comes with one set of mandatory minimums for trafficking a substantial amount and a second, high set of mandatory minimums for ten times that amount. The first set (841(b)(1)(B) levels) has the following thresholds: (1) heroin: 100 grams; (2) powder cocaine: 500 grams; (3) crack: 28 grams; (4) PCP: 100 grams; (5) LSD: 1 gram; (6) propanamide: 40 grams; (7) methamphetamine: 5 grams; and (8) marijuana: 100 kilograms. The second set (841(b)(1)(A) levels): (1) heroin: 1 kilogram; (2) powder cocaine: 5 kilograms; (3) crack: 280 grams; (4) PCP: 100 grams; (5) LSD: 10 grams; (6) propanamide: 400 grams; (7) methamphetamine: 50 grams; and (8)marijuana: 1,000 kilograms.

Severe mandatory minimum penalties also follow conviction under the continuing criminal enterprise ("drug kingpin") section. Section 848(c) defines a continuing criminal enterprise as one in which an individual derives substantial income from directing five or more others in the commission of various controlled substance felonies. The offense itself carries a term of imprisonment of not less than 20 years and may be increased to not more than 30 years for repeat offenders. Furthermore, anyone who kills in furtherance of the enterprise is punishable by imprisonment for not less than 20 years and may be put to death. Large scale drug kingpins who traffic in vast amounts of any of the eight 841(b)(1) substances or who realize vast fortunes from such trafficking receive a mandatory life term of imprisonment upon conviction.

Table 1. Federal Drug Offenses: Mandatory Minimum Terms of Imprisonment

Substance	Minimum	Maximum
Trafficking 841(b)(1)(A) substance (e.g., 1 kilo or more of heroin)	10 years	life
if death or serious injury results	20 years	life
repeat offender	20 years	life
repeat offender if death or serious injury results	life	life
Trafficking 841(b)(1)(B) substance (e.g., 100 grams or more of heroin)	5 years	40 years
if death or serious injury results	20 years	life
repeat offender	10 years	life
repeat offender if death or serious injury results	life	life
Trafficking lesser amounts of 841(b)(1) substances; other schedule I or II substances; or date rape drugs: if death or serious injury results	20 years	life
repeat offender if death or serious injury results	life	life
Simple possession of a controlled substance with 1 prior conviction	15 days	2 years
Simple possession of a controlled substance with 2 or more priors	90 days	3 years
Drug kingpin	20 years	life
repeat offender	30 years	life
large operation (e.g., gross $10 million + per year)	life	life
killing in furtherance	20 years	life/death
Unless a higher minimum applies, distribution of a controlled substance to a pregnant woman, to or using a child.	1 year	2x usual penalty; 3x for repeat offenders
Unless a higher minimum applies, distribution of a controlled substance proximate to a school or other prohibited location	1 year	2x usual penalty
repeat offender	3 years	3x usual penalty
Narco-terrorism involving 841(b)(1) substances	2x usual minimum	life

Possession with Intent: Conviction of possession with intent to distribute various controlled substances forms the basis for imposition of a mandatory minimum sentence under Section 841(b). To support a conviction, "the government must show that the defendant had (1) knowing (2) possession of the drugs and (3) an intent to distribute them." The government need not prove that the defendant knew the particular type or quantity of the controlled substance he intended to distribute. Culpable possession may be either actual or constructive. "Constructive possession exists where the defendant has the power to exercise control or dominion over the item. In drug cases, constructive possession is an appreciable ability to guide the destiny of the contraband." As for the intent to distribute, it "can be proven circumstantially from, among other things, the quantity of cocaine and the existence of implements such as scales commonly used in connection with the distribution of cocaine." Moreover, although proof of sale or gift will suffice, intent to distribute demands no more than an intent to transfer.

The escalating mandatory minimums that apply to offenders with "a prior conviction for a felony drug offense" extend to those classified as misdemeanors under state law but punishable by imprisonment for more than a year. They also apply even though the underlying state felony conviction has been expunged. On the other hand, there is apparently at least a division among the circuits over whether the government's failure to comply with the procedure for establishing a prior conviction, and therefore to alert the defendant of the prospect of an enhanced mandatory minimum, is jurisdictional.

The Sentencing Commission second report made several recommendations relating to repeat offender mandatory minimums. It suggested that the escalator approach in some instances might be unduly severe. It also expressed the view that exclusion of simple possession offenses and greater compatibility with state sentence provisions might be advisable.

The mandatory minimums apply with equal force to those who attempt to possess with intent to distribute, or who conspire to do so, or who aids and abets another to do so. "To prove the crime of attempted knowing or intentional possession, with intent to distribute, of a controlled substance, the government must show: (1) the defendant acted with the intent to possess a controlled substance with the intent to distribute; and (2) the defendant engaged in conduct which constitutes a substantial step toward commission of the offense."

"To establish a conspiracy, the government must prove: (1) the existence of an agreement among two or more people to achieve an illegal purpose; (2) the defendant's knowledge of the agreement; and (3) that the defendant knowingly joined and participated in the agreement." The agreement may be inferred circumstantially. Conspirators need to know the scheme's general outline, but every conspirator need not be informed of the plot's every detail.

"To convict under a theory of aiding and abetting, the Government must prove: (1) the substantive offense was committed; (2) the defendant contributed to and furthered the offense; and (3) the defendant intended to aid in its commission."

Conviction of a Continuing Criminal Enterprise (CCE or Drug Kingpin) offense is punishable by imposition of a mandatory minimum. The courts have held that to secure a conviction, the government must establish "(1) a felony violation of the federal narcotics laws; (2) as part of a continuing series of three or more related felony violations of federal narcotics laws; (3) in concert with five or more other persons; (4) for whom [the defendant] is an organizer, manager or supervision; [and] (5) from which [the defendant] derives substantial income or resources."

The homicide mandatory minimum found in the drug kingpin statute sets a 20-year minimum term of imprisonment for killings associated with a kingpin offense or for killings of law enforcement officers associated with certain other controlled substance offenses.

Safety Valve: Low level drug offenders can escape some of the mandatory minimum sentences if they qualify for the safety valve found in 18 U.S.C. 3553(f). It is available to qualified offenders convicted of violations of the possession with intent, the simple possession, attempt, or conspiracy provisions of the Controlled Substances or Controlled Substances Import and Export Acts. For the convictions to which the safety valve does apply, the defendant must convince the sentencing court by a preponderance of the evidence that he satisfies each of the safety valve's five requirements. He may not have more than one criminal history point. He may not have used violence or a dangerous weapon in connection with the offense. He may not have been an organizer or leader of the drug enterprise. He must have provided the government with all the information and evidence at his disposal. Finally, the offense may not have resulted in serious injury or death.

Two-thirds of the judges who responded to the Commission's survey favored expanding the safety valve criminal history criterion to encompass those with 2 or 3 criminal history points, although fewer than one quarter favored expansion of the criterion further. Some of the Commission's hearing witnesses concurred. The Commission's second report, in fact, recommends that Congress "consider expanding the safety valve ... to include certain offenders who receive two, or perhaps three, criminal history points under the guidelines."

Firearms Offenses

Section 924(c): Mandatory minimums are found in two federal firearms statutes. One, the Armed Career Criminal Act, deals exclusively with recidivists. The other, Section 924(c), attaches one of several mandatory minimum terms of imprisonment whenever a firearm is used or possessed during and in relation to a federal crime of violence or drug trafficking. Section 924(c) has been the subject of repeated Supreme Court litigation and regular congressional amendment since its inception in 1968. Section 924(c), in its current form, imposes one of several different minimum sentences when a firearm is used or possessed in furtherance of another federal crime of violence or of drug trafficking.

The mandatory minimums, imposed in addition to the sentence imposed for the underlying crime of violence or drug trafficking, vary depending upon the circumstances: (1) imprisonment for not less than 5 years, unless one of higher mandatory minimums below applies; (2) imprisonment for not less than 7 years, if a firearm is brandished; (3) imprisonment for not less than 10 years, if a firearm is discharged; (4) imprisonment for not less than 10 years, if a firearm is a short-barreled rifle or shotgun or is a semi-automatic weapon; (5) imprisonment for not less than 15 years, if the offense involves the armor piercing ammunition; (6) imprisonment for not less than 25 years, if the offender has a prior conviction for violation of Section 924(c); (7) imprisonment for not less than 30 years, if the firearm is a machine gun or destructive device or is equipped with a silencer; and (8) imprisonment for life, if the offender has a prior conviction for violation of Section 924(c) and if the firearm is a machine gun or destructive device or is equipped with a silencer.

As a general rule, conspirators are liable for any foreseeable crimes committed by any of their co-conspirators in furtherance of the conspiracy. The rule applies when a defendant's co-conspirator has committed a violation of Section 924(c).

Under federal law, moreover, anyone who commands, counsels, aids, or abets the commission of a federal offense by another is punishable as though he had committed the crime himself, 18 U.S.C. 2. Here too, the general proposition applies to Section 924(c). "[A] defendant is liable of aiding and abetting the use of a firearm during a crime of violence if he (1) knows his cohort used a firearm in the underlying crime, and (2) knowingly and actively participates in that underlying crime."

The Second Amendment states that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Supreme Court has explained that the Second Amendment confers an individual right to possess and carry weapons for the defense of his or her person, family, and home. The Court has been quick to point out, however, that the right is not absolute. Without providing a full panoply of exceptions, it observed that the Amendment permits such things as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [and] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms." Consistent with this theme, the circuit courts have held that the Second Amendment cast no constitutional doubt upon Section 924(c).

The Fifth Amendment declares that "No person shall be ... subject for the same offence to be twice put in jeopardy of life or limb.... " The double jeopardy clause protects against both successive prosecutions and successive punishments for the same offense. The initial test for whether a defendant has been twice tried or punished for the same offense or two different offenses is whether each of the two purported offenses requires proof that the other does not. Thus, without violating the double jeopardy clause, an individual may be convicted and sentenced for two violations of Section 924(c), if each has a different predicate offense. On the other hand, there is no consensus over whether a single predicate offense may support conviction and sentencing for two or more violations of Section 924(c). Moreover, the conviction for a serious offense will ordinarily preclude prosecution or punishment for a lesser included offense, since the lesser offense consists of only elements found in the more serious offense. For example, a defendant may not be convicted and punished for both a violation of Section 924(c)(use of a firearm in furtherance of a robbery) and of Section 924(j)(use of the same firearm in the same robbery resulting in death).

More than 60% of the judges who responded to the Commission's survey felt that the mandatory minimum sentencing provisions of Section 924(c) were appropriate. Nevertheless, the Commission recommended that Congress consider several modifications: (1) "Congress should consider amending the mandatory minimum penalties established at section 924(c), particularly the penalties for 'second or subsequent' violations of the statute, to lesser terms." (2) "Congress should consider amending section 924(c) so that the increased mandatory minimum penalties for a "second or subsequent" offense apply only to *prior* convictions." (3) "Congress should consider amending section 924(c) to give the sentencing court limited discretion to impose sentences for multiple violations of section 924(c) concurrently." (4) "Congress should consider clarifying the statutory definitions of the underlying and predicate offenses that trigger mandatory minimum penalties under section 924(c) and the Armed Career Criminal Act to reduce the risk of inconsistent application and the litigation that those definitions have fostered."

Armed Career Criminal Act (18 U.S.C. 924(e)): The Armed Career Criminal Act (ACCA) establishes a 15-year mandatory minimum term of imprisonment for defendants convicted of unlawful possession of a firearm under Section 18 U.S.C. 922(g) who have three prior convictions for violent felonies or serious drug offenses.

Congress's constitutional authority to regulate interstate and foreign commerce is among its most sweeping prerogatives, but the power is not boundless. It permits regulation of the use of the channels of commerce, of the instrumentalities of commerce, of the things that move there, and of those activities which substantially impact commerce. Absent such a nexus, it does not permit Congress to enact legislation proscribing possession of a firearm on school grounds, as the Supreme Court observed in *Lopez*. Section 922(g) outlaws receipt by a felon of a firearm "which has been shipped or transported in interstate or foreign commerce." This, in the view of the circuit

courts to address the issue, is sufficient to bring within Congress's commerce clause power the prohibitions of Section 922(g), that Section 924(e) makes punishable.

In Section 924(e) cases, the courts ordinarily proceed no further in their Second Amendment analysis than to the threshold possession offense, *e.g.*, 18 U.S.C. 922(g)(1)(prohibiting firearm possession by convicted felons). Pointing to the statement in *Heller*, they conclude that the possession offense does not offend the Second Amendment. From which it seems to follow that Section 924(e), at least when it imposes a mandatory minimum sanction upon felons who violate Section 922(g)(1), is similarly inoffensive.

The Supreme Court in *Almendarez-Torres* identified the fact of a prior conviction as a sentencing factor. The Court has yet to revisit *Almendarez-Torre*s, and the lower federal courts continue to adhere to it in Section 924(e) cases: the fact of a prior qualifying conviction need not be charged in the indictment nor proved to the jury beyond a reasonable doubt.

Defendants sentenced under Section 924(e) have suggested two Eighth Amendment issues. First, they argue that their sentences are disproportionate to their offenses. Second, they contend that crimes committed when they were juveniles may not be used as predicates. The lower federal courts have consistently rejected general claims that sentences under 924(e) were grossly disproportionate to the crimes involved. In cases decided before *Graham*, the lower federal courts had also rejected claims that the Eighth Amendment precluded use of a juvenile predicate offense to trigger sentencing of an adult under Section 924(e). To date, there have been no subsequent federal appellate court decisions directly on point. Two circuits, however, have found no Eighth Amendment impediment to mandatory life imprisonment sentences imposed under provisions other than Section 924(e) upon adults convicted of drug trafficking and based in part on predicate juvenile offenses.

The Fifth Amendment ensures that no "person be subject for the same offence to be twice put in jeopardy of life or limb." The double jeopardy clause protects against both successive prosecutions and successive punishments for the same offense. The test for whether a defendant has been twice tried or punished for the same offense or tried or punished for two different offenses is whether each of the two purported offenses requires proof that the other does not. Defendants have argued to no avail that the double jeopardy clause bars reliance on the predicate offenses or on Section 922(g) to trigger Section 924(e).

Almost 60% of those responding to a Sentencing Commission survey indicated that they considered the Section 924(e) mandatory minimum sentences appropriate.

Sex Offenses

Congress increased the number of federal sex offenses and their attendant mandatory minimum sentences beginning in 1978 with the enactment of the first federal child pornography statutes. It filled out the complement of federal sex offenses with mandatory minimum sentences of imprisonment at fairly regular intervals thereafter. The current array includes the following:

Table 2. Federal Sex Offenses: Mandatory Minimum Terms of Imprisonment

Citation	Offense	Mandatory Minimum Term of Imprisonment
18 U.S.C. 2241(a)	aggravated sexual assault (by threat or force)(including attempt)	any term of years
18 U.S.C.2241(b)	aggravated sexual assault (upon an incapacitated victim)(including attempt)	any term of years
18 U.S.C. 2241(c)	a. sexual act (victim under 12 or victim under 16 and at least 4 years the offender's junior)(including attempt)	a. 30 years
	b. with a prior conviction	b. life
18 U.S.C. 1591	a. sex trafficking by force or fraud or of a child under 14	a. 15 years
	b. sex trafficking of a child (14 to 18)(w/o force or fraud)	b. 10 years
18 U.S.C. 2422(b)	enticing or coercing a child under 18 to engage in prostitution (including attempt)(Mann Act)	10 years
18 U.S.C. 2423(a)	transporting a child under 18 for illicit sexual purposes (including attempt) (Mann Act)	10 years
18 U.S.C. 2245	murder in the course of a Mann Act, sex trafficking, or production of child pornography offense	any term of years
18 U.S.C. 2251	child pornography: inducing a child under 18 to produce, custodial involvement in production, or advertising (including attempt)	
	a. death results	a. 30 years
	b. 2 or more prior convictions	b. 35 years
	c. 1 prior conviction	c. 25 years
	d. otherwise	d. 15 years
18 U.S.C. 2251A	child pornography: custodial involvement in production	30 years
18 U.S.C. 2252	a. child pornography (real): transportation, receipt, or sale (including attempt)	a. 5 years
	b. prior conviction	b. 15 years
	c. child pornography (real): recidivist possession	c. 10 years

Citation	Offense	Mandatory Minimum Term of Imprisonment
18 U.S.C. 2252A	a. child pornography (real or virtual): transportation, receipt, promotion, sale, or distribution to a child (including attempt)	a. 5 years
	b. prior conviction	b. 15 years
	c. child pornography (real or virtual): recidivist possession	c. 10 years
18 U.S.C. 2252A(g)	child exploitation enterprise; 3 or more instances involve 3 or more others and multiple victims of child pornography, child sex trafficking, or Mann Act violations involving a child	20 years
18 U.S.C. 3559(e)	federal sex offense (sex trafficking, sexual assault, Mann Act, or production of child pornography violation), involving a victim under 17, by an offender with a prior federal or state equivalent conviction and sentence	life

A majority of the judges responding to a Sentencing Commission survey thought that the mandatory minimum sentences for production and distribution of child pornography and other child exploitation offenses were generally appropriate. Well over two-thirds, however, considered those for receipt of child pornography too high.

The Commission's report on mandatory minimum sentencing statutes noted that its "review of available sentencing data [relating to sex offenses] indicates that further study of these penalties is needed before it can offer specific recommendations in this area." It concluded preliminarily, however, that "the mandatory minimum penalties for certain non-contact child pornography offenses may be excessively severe and as a result are being applied inconsistently."

Identity Theft

Aggravated identity theft is punishable by imprisonment for two years, and by imprisonment for five years if the offense involves a federal crime of terrorism. Aggravated identity theft only occurs when the identity theft happens "during and in relation" to one of several other federal crimes. It has the effect of establishing a mandatory minimum for each of those predicate offenses that would not otherwise exist.

More than half of the judges who responded to a United States Sentencing Commission survey felt that the two-year mandatory minimum was a generally appropriate sentence. The Sentencing Commission's report on mandatory minimum penalties makes little if any mention of the five-year terrorism penalty and instead directs its attention to the two-year identity theft mandatory minimum. The Commission further confines itself to comparatively complimentary observations rather than recommendations, due to the provision's relatively recent emergence and its somewhat unique characteristics.

Section 1028A only punishes aggravated identity theft by individuals. Most federal crimes outlaw misconduct by both individuals and organizations, such as corporations, firms, and other legal

entities. The Dictionary Act explains that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise … the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." Section 1028A is one of those situations when "the context indicates otherwise."

Entities other than individuals can be fined, but they cannot be imprisoned. Section 1028A punishes violations with a flat term of imprisonment, but no fine. Thus, only individuals may be punished for violating the section. For the same reason, persons other than individuals may not incur criminal liability indirectly as principals under 18 U.S.C. 2. Principals are subject to the same penalties, in this case only imprisonment.

Persons other than individuals may, however, incur criminal liability as conspirators. The federal conspiracy statute outlaws conspiracy to commit any federal crime, including aggravated identity theft. It makes conspiracy punishable by both a fine and a term imprisonment. Thus, it seems possible for a person other than an individual to incur criminal liability for conspiracy to commit aggravated identity theft.

The phrase "during and in relation to" describes the connection, necessary for a violation under the section, between the predicate offense and the other identity theft elements. The phrase also appears in the mandatory minimums of 18 U.S.C. 924(c) that apply when a firearm is used "during and in relation to" certain crimes of violence or drug trafficking.

There, the Supreme Court has said the "in relation to" portion of the phrase requires that the firearm "must facilitate or have the potential of facilitating" the predicate offense. This suggests that the "phrase 'in relation to' in §1028A … means that the 'in relation to' element is met if the identity theft 'facilitates or has the potential of facilitating' that predicate felony." Whether the identity theft occurs "during" the predicate offense depends on the duration of the predicate offense.

Section 1028A recognizes two classes of predicate offenses—one of which involves terrorist offenses and carries a five-year term of imprisonment; the other of which does not and carries a two-year term. Proof of the commission of one of the qualifying predicate offenses is an element of aggravated identity theft. The defendant, however, need not otherwise be charged or convicted of the predicate offense. Moreover, the Constitution's double jeopardy clause, which prohibits multiple punishments for the same offense, bars prosecution for both aggravated identity theft and the parallel identity theft provision. Attached is the list of more than 60 federal theft, fraud, immigration, and related felonies for which the two-year mandatory minimum sentencing provision provides a sentencing floor when identity theft is involved.

The terrorist predicate offenses are the federal crimes of terrorism, listed in 18 U.S.C. 2332b(g)(5)(B), regardless of whether the predicate offense was committed for a terrorist purpose. A list of the close to 50 terrorist predicate offenses also appears below as an attachment. The five-year aggravated identity theft offense seems to have been infrequently prosecuted thus far.

The Supreme Court in *Flores-Figueroa* made clear that the knowledge element colors each of the other elements. The government must prove that the defendant was aware that he transferred, possessed, or used something. It must prove that the defendant was aware that he was doing so without lawful authority. Finally, it must prove that the defendant was aware that the something he unlawfully possessed, transferred, or used was that of another person. What constitutes a proscribed transfer, possession, or use appears to have been a matter of dispute only rarely, perhaps because of the limitations posed by the other elements. For example, the requirement that possession be knowing and in relation to a predicate offense cabins the otherwise natural scope of the term "possession."

The "lawful authority" element addresses whether the law permits the defendant to use the identification of another, not whether the defendant has the permission of another to borrow the means of identification. Thus, "the use of another person's social security number to commit a qualifying felony, even with that person's permission, serve[s] as use 'without lawful authority' in violation of §1028A." Moreover, a defendant may be guilty of using the means of identity of another without lawful authority for certain purposes, even though he has lawful authority to use the identification for other purposes.

The term "means of identification" in the aggravated identify theft provision draws its meaning from the definition of that term in the generic identity theft provision. "The 'overriding requirement' of [that] definition is that the means of identification 'must be sufficient to identify a specific individual.'" The statute does not extend to the use of a "fake ID" that does not identify with a real person. On the other hand, the "other person" element reaches both the living and dead. Moreover, although only an individual may engage in aggravated identity theft, the victim of such a theft might well include persons who are legal entities rather than individuals.

The Sentencing Commission's assessment of sentencing under the provision is guardedly laudatory: "The problems associated with certain mandatory minimum penalties are not observed, or are not as pronounced, in identity theft offenses. The Commission believes this is due, in part, to 18 U.S.C. §1028A requiring a relatively short mandatory penalty and not requiring stacking of penalties for multiple counts. The statute is relatively new and is used in only a handful of districts, however, so specific findings are difficult to make at this time."

Three Strikes (18 U.S.C. 3559(c))

A defendant convicted of a federal "serious violent felony" must be sentenced to life imprisonment under the so-called three strikes law, 18 U.S.C. 3559(c), if he has two prior state or federal violent felony convictions or one such conviction and a serious drug offense conviction.

Over 60% of the federal district court judges responding to a subsequent commission survey indicated they considered federal mandatory minimum sentences too high. Although the survey asked specifically about sentences under other mandatory minimum statutes, it provided no opportunity for a response focused on Section 3559(c).

Section 3559(c) requires prosecutors to follow the notice provisions of 21 U.S.C. 851(a), if they elect to ask the court to sentence a defendant under the three strikes provision. Section 851(a), in turn, requires prosecutors to notify the court and the defendant of the government's intention to seek the application of Section 3559(c) and the description of the prior convictions upon which the government will rely. Without such notice, the court may not impose an enhanced sentence. The purpose of the requirement "is to ensure the defendant is aware before trial that he faces possible sentence enhancement as he assesses his legal options and to afford him a chance to contest allegations of prior convictions." As long as that dual purpose is served, however, a want of meticulous compliance or complete accuracy will not preclude enhanced sentencing. The objections most often raised are constitutional challenges and those that question the qualifications of prior convictions as predicate offenses.

Serious drug offenses for purposes of Section 3559(c) consist of (a) federal drug kingpin offenses; (b) the most severely punished of the federal drug trafficking offenses; (c) the smuggling counterpart of the such trafficking offenses; and (d) state equivalents of any of these three. When the prosecution relies upon a state drug trafficking conviction, for example, it must show that the amount of drugs involved warranted treating it as an equivalent. The federal three strikes provision recognizes convictions for two categories of serious violent felonies—one

enumerated, the other general. The inventory of enumerated serious violent felonies consists of the federal or state crimes of (1) murder; (2) manslaughter other than involuntary manslaughter; (3) assault with intent to commit murder; (4) assault with intent to commit rape; aggravated sexual abuse and sexual abuse; (5) abusive sexual contact; (6) kidnapping; (7) aircraft piracy; (8) robbery; (9) carjacking; (10) extortion; (11) arson; (12) firearms use; (13) firearms possession; and (14) attempt, conspiracy, or solicitation to commit any of the above offenses.

The more general, unenumerated category consists of "any other [state or federal] offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."

Defendants sentenced under Section 3559(c) have raised many of the same constitutional arguments asserted by defendants subject to other mandatory minimum sentences. Here too, their arguments have been largely unavailing. *Almendarez-Torres* blocks the contention that prior convictions must be noted in the indictment and proven to the jury beyond a reasonable doubt. Defendants who claimed that Section 3559(c) has a disparate racial impact and therefore offends equal protection have been unable to show, as they must, that it was crafted for that purpose. Generally the Eighth Amendment's "grossly disproportionate" standard (severity of the sentence in light of gravity of the offense) has proven too formidable for defendants sentenced under the section to overcome. The courts remain to be convinced that the mandatory minimum features of the section pose any separation of powers impediments. Defendants who invoke double jeopardy have been reminded that "the Supreme Court has long since determined that recidivist statutes do not violate double jeopardy because 'the enhanced punishment imposed for the later offense is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" Much the same response has awaited those in Section 3559(c) cases who seek refuge in ex post facto, "the use of predicate felonies to enhance a defendant's sentence does not violate the Ex Post Facto Clause because such enhancements do not represent additional penalties for earlier crimes, but rather stiffen the penalty for the latest crime committed by the defendant."

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